IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17367 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KETAN ENTERPRISE

Versus

ULKIT NARENDRABHAI AMIN

Appearance:

1. Special Civil Application No. 17367 of 2003

MR KIRAN C RAVAL for Petitioner No. 1

MR TARESH J BHATTJI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 02/04/2004

ORAL JUDGEMENT

Rule. Mr.Bhattji waives service of rule on

behalf of respondent. With the consent of learned counsel for parties matter is taken up for final hearing today.

2. The only question which arises for consideration is whether the Commissioner under Workmen's Compensation Act, 1973 (hereinafter referred to as "the Act") could have ordered for compensation at the rate of 44% though as per schedule the maximum disability is 40%.

3. The short facts of the case are that the respondent was in the employment of the petitioner and while on duty he received injury and as a result thereof there was amputation of thumb. The respondent preferred application before the Commissioner under the Act for recovery of amount of Rs.49,548.40ps with interest. Said application was registered as Workman Compensation Application No.10/96. The Commissioner ultimately passed the order dated 17.1.03 whereby the respondent therein who is petitioner herein was ordered to make payment of Rs.49,548.40ps with interest at the rate of 6% p.a. from the date of accident and penalty of Rs.10,000/-. The petitioner has challenged the said order in this petition.

4. I have heard Mr.Raval for the petitioner and Mr.Bhattji for the respondent. Mr.Raval for the petitioner raised the only contention that the Commissioner under the Act could not have relied upon the certificate of a private doctor and he further submitted that as per Schedule I, maximum disability even if it is a loss of terminal phalanx of thumb and its metacarpal bone it would be 40%. The Commissioner has ordered for payment on the basis of disability at the rate of 44%. Mr.Raval also submitted that if this court modifies the order passed by the Commissioner by reducing disability from 44% to 40% the petitioner is agreeable to make the payment. However, he submitted that the petitioner is a small businessman and therefore the petitioner may be allowed to make payment of the amount by instalment of Rs.5,000/-p.m.

5. On behalf of respondent Mr.Bhattji interalia submitted that there is remedy of regular appeal against the decision of the Commissioner and he further submitted that the doctor's certificate is exhibited by consent and therefore the petitioner can not object to production and reliance on doctor's certificate by the Commissioner. However, Mr.Bhattji also submitted that if this court is inclined to consider the permanent disability at the rate of 40% and if the petitioner is ordered to make payment

of amount by installments at the rate of Rs.5,000/-p.m. the respondent is agreeable for the same. He also submitted that the amount which is already deposited by the petitioner pursuant to the order passed by this court may be allowed to be withdrawn by the respondent and the court may pass appropriate orders directing the petitioner to make the to the respondent directly.

6. In view of the aforesaid so far as the production and reliance on private doctor's certificate is concerned, even otherwise also said objection can not be accepted, more particularly, when the doctor's certificate is exhibited with consent. Once a document is exhibited and accepted as an evidence, it can not be said that the Commissioner has committed error in relying upon the said document. However, at the same time, the certificate even if considered as a valid piece of evidence on record then also the disability is at the rate of 44%. In this regard, if reference is made to Schedule I Part II Item 6 of the Act, it provides that the maximum disability for loss of thumb is 40% when it is with metacarpal bone. There is no dispute on the point that the workman has suffered injury and loss of thumb. It did not come on record before the Commissioner that the loss of thumb was not with metacarpal bone and therefore if the said aspect is considered, in my view, the Commissioner could not have accepted the evidence of certifying disability by the doctor beyond the statutory limit. As provided under the Act read with Schedule the maximum disability is 40% in such cases. At the most, the Commissioner could have accepted the certificate to the extent of disability at the rate of 40%. It is not necessary to record the reasons further as the learned counsel appearing for both sides have agreed for modification of the permanent disability from 44% to 40%.

7. So far as mode of payment is concerned, such payment by suitable installments at the rate of Rs.5,000/-p.m. is also not objected on behalf of the workman concerned. Even otherwise also, the workman is to get interest on the outstanding amount since it is been so ordered by the Commissioner at the rate of 6% p.a. Therefore, I find that if the payment is made by installments at the rate of Rs.5,000/-p.m. the same is not likely to cause any prejudice, and even otherwise also the workman is agreeable for such purpose.

8. In view of the aforesaid peculiar facts and circumstances, and more particularly, when the litigation is since 1998 and the accident is of 1994, if the petitioner is relegated to remedy of appeal no useful

purpose would be served and in view of the reasons recorded earlier and when the Ld.counsel for both sides are agreeable for modification, I find that in view of peculiar facts and circumstances in the present case, normal principles of relegating the parties to statutory remedy is not required and the powers of this court under Article 226/227 of the Constitution of India can beexercised, and therefore, the matter is also considered on merits. Even otherwise also it is well settled that the existence of alternative remedy is not to operate as bar to the powers of this court under Article 226/227 of the Constitution of India and as observed earlier in the present since there are peculiar facts and circumstances and the petition should not be thrown away merely because appeal is not preferred.

9. In view of the aforesaid discussion, the order passed by the Commissioner under Workmen's Compensation Act, dated 17.1.03 in Workman Compensation Application No.10/96 is not disturbed except to the extent that the permanent disability liability shall be 40% in place of 44%. Other formula for payment applying the factors to the income of the workman the interest and penalty will be the same. As a consequence thereof, the petitioner shall be required to make payment of Rs.45,044/- with interest at the rate of 6% p.a.from the date of accident and the penalty of Rs.10,000/-. However, the petitioner shall be at liberty to make payment to the respondent workman by installments at the rate of Rs.5,000/-p.m. and such payment of Rs.5,000/-p.m. shall continue from next month until the principal amount with due interest and penalty is fully paid. The respondent shall be at liberty to withdraw the amount of Rs.30,000/- which is deposited by the petitioner. Office shall disburse the payment by A/C Payee cheque drawn in favour of respondent-workman. The aforesaid amount shall be adjusted towards the liability of making payment as indicated earlier.

10. The petition is partly allowed to the aforesaid extent. Rule is made absolute accordingly. Considering the facts and circumstances of the case, there shall be no order as to costs.

2.4.04 (JAYANT PATEL,J)